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No. 81-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

GARNETT WILLIAM CAPE

Petitioner,

-against-

WALTER D. ZANT,
Superintendent
Georgia Diagnostic
Classification
Center

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

STEPHEN B. BRIGHT
Suite 202
419 Seventh Street, N.W.
Washington, D.C. 20004
(202)638-4798

Counsel for Petitioner

QUESTIONS PRESENTED

1. What minimum standard of competence of defense counsel is required in capital cases in order to satisfy the Sixth, Eighth and Fourteenth Amendments to the Constitution?

2. Whether petitioner's rights under the Sixth, Eighth and Fourteenth Amendments were violated by counsel's lack of competence, including his failure to present available evidence in mitigation at the sentencing phase of petitioner's trial?

3. Whether instruction of the jury in the bare words of the statute authoritizing the death penalty for any murder found to be "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim" provided sufficient guidance for the consideration of the death penalty as required by the Eighth and Fourteenth Amendments?

4. Whether the Georgia courts have adopted such a broad and vague construction of the word "torture" in upholding petitioner's sentence of death as to violate the Eighth and Fourteenth Amendments to the Constitution?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

OPINION BELOW

The decision of the Superior Court of Butts County is appended to this petition at 1a. It was not reported. The Supreme Court of Georgia denied an application for a certificate of probable cause to appeal, thereby declining to review the decision of the Superior Court of Butts County. The orders of the Georgia Supreme Court denying the application and a motion to reconsider the denial are appended at 20a and 21a.

JURISDICTION

The decision of the Superior Court of Butts County was entered October 28, 1981. Petitioner sought review of the decision by the Supreme Court of Georgia. That court denied an application for probable cause to appeal on February 24, 1982. Appendix at 20a. The Supreme Court of Georgia also denied an application for reconsideration of its denial on March 24, 1981. Appendix at 21a. Said denial of an applica-

tion for probable cause to appeal operates to deny petitioner any review of the decision of the Superior Court of Butts County by a state court in Georgia. Jursidiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here a deprivation of rights secured by the constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the Constitution provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

The Eighth Amendment provides:

> Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishments inflicted.

The Fourteenth Amendment provides in relevant part:

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

This case involves the seventh aggravating circumstance of Georgia's death penalty statute, Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where:

> The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

STATEMENT OF THE CASE

Garnett William Cape seeks a writ of certiorari from this Court to the Superior Court of Butts County, Georgia, to review a decision of that court denying his application for a writ of habeas corpus.

Mr. Cape asserted in the court below that he was being wrongfully detained by the respondent pursuant to a conviction

of murder and sentence of death which were imposed upon him by the state of Georgia in violation of rights guaranteed by the Constitution of the United States, and asked that court to vacate his conviction and sentence. He alleged, inter alia, that he was denied effective assistance of counsel at his trial because of the inadequacy of his court-appointed attorney, that the discretion of the jury that sentenced him to death was not properly guided by the trial court, and that he was sentenced to death under a vague and overbroad construction of the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1 (b)(7), which provides for the death penalty where the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."

The Superior Court of Butts County denied the application for a writ of habeas corpus, and the Supreme Court of Georgia declined to review the decision.

Mr. Cape was fifty-six years of age at the time of his trial on the charge of murder. He lived most of his life in Franklin County or the neighboring Hart County in northeast Georgia, had one son, and supported his family by working in the plumbing and electrical business. His arrest on the evening of May 17, 1979, in connection with the murder of Karen Dove was his first arrest.

Mr. Cape was tried by a jury in the Superior Court of Franklin County, November 5-8, 1979. P's pretrial motion for a change of venue was denied, Tr. 19A, 22A. 1/ The State

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1/ "Tr." refers to the transcript of petitioner's trial in the Franklin Superior Court. "R." refers to the record on appeal in the direct appeal of his conviction to the Georgia Supreme Court, both of which were made a part of the record in the court below. "HC" refers to the transcript of the hearing on the petition for a writ of habeas corpus before the Butts County Superior Court on May 19, 1981.

presented evidence that the body of Karen Dove, age fifteen, was discovered at Mr. Cape's home on the evening of May 17. Tr. 266. She had suffered extensive injuries, including seven stab wounds. Tr. 389-301. The State introduced evidence that petitioner had been with the decedent earlier on the afternoon on which her body was found. Tr. 572. It also introduced inculpatory statements by petitioner. Tr. 454-55, 466-67, 470-71.

In his defense, Mr. Cape called nine witnesses who testified to his good character and reputation for nonviolence in the community. Tr. 586-603. Mr. Cape also testified and denied killing the decedent. Tr. 604-92.

At a brief sentencing hearing, Mr. Cape's son, two sisters and a brother were called and asked a few questions about Mr. Cape. Tr. 782-786.[2/] Mr. Cape also took the witness stand and asked the jury not to send him to the electric chair. Tr. 787. The State presented Agent R.C. Patterson of the Georgia Bureau of Investigation. Agent Patterson testified that in his opinion he had never seen a death more brutal than this one. Tr. 780.

The State had alleged that the murder was aggravated by the conditions set forth in Georgia Code Ann. Sec. 27-2534.1(b)(7). The trial court instructed the jury as follows regarding that aggravating circumstance:

> Now, in this case, ladies and gentlemen, the one we are trying, the State contends that the offense of murder for which the accused, Garnett William Cape, has been convicted was outrageously or wantonly vile, horrible, or inhuman, in that

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2/ The Superior Court of Butts County incorrectly stated in its findings of fact that six witnesses were called on behalf of petitioner. Op. at 5, App. at 5a. Although six witnesses were called at the hearing, two were called by the State. Tr. 777, 781.

> it involved torture, depravity of mind, or an aggravated battery to the victim, Karen Dove.

Tr. 812. The jury was given no definition of any of the terms of section (b)(7) or any other guidance in the application of the statute to the facts of the case. With regard to mitigating circumstances, the jury was told that it could consider "those circumstances which in fairness and mercy shall be considered by you in fixing the punishment[]" without further elaboration. Tr. 813.

The jury recommended that Mr. Cape be sentenced to death and the court accordingly sentenced him to death in the electric chair. Tr. 816-17. The conviction and sentence were upheld on direct appeal by the Supreme Court of Georgia, Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980), cert. denied, ___ U.S. ___, 67 L.Ed.2d 121 (1981).

Thereafter, Mr. Cape filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia, where he is confined on death row awaiting execution. The Superior Court issued a stay of execution and conducted a hearing on May 19, 1981. However, the court denied petitioner's motion for funds to retain counsel, investigators, experts and law clerks to aid him in the presentation of evidence in support of his contentions. Even petitioner's request for authorization to subpoena witnesses and for witness fees and mileage expenses was denied. As a result, petitioner was represented by volunteer counsel at his hearing.

Nevertheless, petitioner presented the testimony of three persons at the hearing and submitted depositions of three others and affidavits of four others to demonstrate

that compelling evidence in mitigation could have been presented to the jury that sentenced him to die, but was not offered because of the failure of his counsel to investigate his background and prepare properly for the sentencing phase of the trial. Petitioner also submitted depositions of two forensic science experts to show that opinion testimony of a state crime laboratory serologist offered by the prosecution at trial was highly suspect and could have been contested if trial counsel had consulted with and presented experts. Petitioner also presented evidence, through affidavits and depositions, of the high degree of knowledge about the case and hostility toward the petitioner in the community. His court-appointed lawyer had not offered any such evidence in support of a motion for a change of venue. The respondent offered the testimony of the lawyer who represented Mr. Cape at his trial.

HOW THE FEDERAL QUESTION WAS PRESENTED AND DECIDED BELOW

Petitioner alleged in paragraph 6 of his petition for a writ of habeas corpus that his court-appointed attorney did not render effective assistance of counsel during the sentencing phase of his trial in violation of the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States. In paragraph 13 of the petition, he alleged that the same constitutional guarantees were violated by counsel during the guilt-innocence stage of his trial. In other paragraphs of the petition and supplemental pleadings, petitioner set out in detail the basis for these contentions. He also presented testimony, depositions, affidavits and legal arguments in support of these contentions. The Superior Court of Butts County held that petitioner was not denied his

right to counsel under the Sixth Amendment. The court applied the standard set out in MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961), and Fitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974): " . . . not errorless counsel and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance." Opinion at 5-6, App. at 5a-6a. Although acknowledging that petitioner had also based his claim on the Eighth Amendment, Op. at 2, App. at 2a, the court did not mention the Eighth Amendment in its analysis of the petitioner's claim.

In paragraphs 5-11 of his Supplemental Grounds and Amendments to Petition for a Writ of Habeas Corpus, petitioner asserted that his sentence of death was invalid because the trial court, by instructing the jury in the bare words of Ga. Code Ann. § 27.2534.1(b)( ), failed to guide the discretion of the jury as required by the Eighth and Fourteenth Amendments to the U.S. Constitution. The petitioner submitted written legal arguments in support of this contention. The Superior Court rejected this claim stating, "This Court is unaware of any requirement of specific fact-finding by a jury for (b)(7) other than to find its existence beyond a reasonable doubt." Op. at 17, App. at 17a. It also based its decision on the holdings of the Georgia Supreme Court on direct appeal. Id.

In paragraph 12 of his Supplemental Grounds and Amendments, petitioner asserted that the aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7) as applied in a vague and overbroad manner to the facts of this case in violation of the Eighth and Fourteenth Amendments to the Constitution. Petitioner submitted written legal arguments in support of this contention. The Superior Court rejected this contention

on the basis of the holding of the Georgia Supreme Court on direct appeal. Op. at 18, App. at 18a.

REASONS FOR GRANTING THE WRIT

For the reasons which follow, this Court should issue a writ of certiorari to review the decision of the Georgia Supreme Court.

I. THIS COURT SHOULD REVIEW THE DECISION BELOW TO DECIDE WHAT STANDARD OF COMPETENCY OF COUNSEL IS CONSTITUTIONALLY REQUIRED IN DEATH PENALTY CASES.

This Court should issue a writ of certiorari to decide a question of fundamental importance to the administration of criminal justice in both state and federal courts: what minimum standard of competence of defense counsel is required in capital cases in order to satisfy the Sixth and Eighth Amendments to the Constitution.

Although this Court has observed that the Sixth Amendment's right to counsel includes the right to effective assistance "within the range of competence demanded of attorneys in criminal cases[]", McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970), it left determination of this range of competence to the "good sense and discretion of trial courts." Id.

The Superior Court of Butts County, in deciding petitioner's claim of ineffective assistance of counsel, applied the standard adopted by both the Supreme Court of Georgia[3/] and the United States Court of Appeals for the Fifth Circuit:[4/] "counsel reasonably likely to render and rendering reasonably effective assistance." App. at 5a-6a. This is but one of

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3/ Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974).

4/ MacKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961)

several standards which is applied in state and federal courts in determining the adequacy of counsel under the Sixth Amendments. See Erickson, Standards of Competency for Defense Counsel in a Criminal Case, 17 Am. Cr. L. Rev. 233 (1979). Some jurisdictions find counsel's ineffectiveness to violate the Sixth Amendment only if the incompetence was so gross that it rendered the proceedings a "farce and mockery of justice."[5/] The inquiry in other jurisdictions has been whether there was "gross incompetence of counsel which in effect blotted out the essence of a substantial defense,"[6/] whether counsel has exercised the "skill, judgment and diligence of a reasonably competent defense attorney,"[7/] whether the accused was represented by a "reasonably competent attorney acting as a diligent conscientious advocate,"[8/] or whether there has been "serious incompetency" that falls "measurably below the performance ordinarily expected of fallible lawyers" that "likely" affected the outcome of the trial.[9/]

5/ Erickson found in 1979 that nineteen states were applying the "farce and mockery" standard. Erickson, supra at 239 n. 53. However, in the last three years, some of those jurisdictions have rejected this standard as constitutionally insufficient. See, e.g., Lang v. Murch, 438 A.2d 914 (Me. 1981); State v. Orona, 638 P.2d 1077 (N.M. 1982).

6/ Johnson v. United States, 413 A.2d 499, 504 (D.C. App. 1980).

7/ Dyer v. Crisp, 613 F.2d 275, 278 (10th Cir. 1980); State v. Orona, supra. See also United States v. Easter, 539 F.2d 663, 666 (8th Cir. 1976).

8/ Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978); People v. Pope, 23 Cal.3d 412, 423, 590 P.2d 859, 865, 152 Cal. Rptr. 732, 738 (1979).

9/ Commonwealth v. Seferian, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974); United States v. DeCoster, 199 U.S. App. D.C. 359, 624 F.2d 196, 206 (1979) (opinion of Leventhal, J.), cert. denied, 444 U.S. 944 (1979).

These efforts to formulate a standard for determining whether incompetence violated the Sixth Amendment have been described as a "semantic merry-go-round."[10/] Mr. Justice White has observed that the efforts of the federal courts of appeals to formulate a standard has left them in "disarray."[11/]

This Court should grant certiorari to determine not only whether the court below applied the proper standard to determine counsel's competencey under the Sixth Amendment, but also to determine whether a more strict standard is required by the Eighth Amendment in assessing counsel's competency in death penalty cases. A brief discussion of counsel's failure to develop and present available evidence at the sentencing phase of petitioner's trial demonstrates the applicability of Eighth Amendment principles to the question of counsel's competence.

This Court has vacated death sentences where the sentencer was prohibited from considering or failed to consider any aspect of the defendant's character as a mitigating circumstance. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, ___ U.S. ___, 71 L.Ed2d 1, 102 S.Ct. 869 (1982). The failure to consider such evidence "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the

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10/ Cooper v. Fitzharris, 551 F.2d 1162, 1166 (9th Cir. 1977) (Dunlway, J., concurring), vacated, 586 F.2d 1325 (1978) en banc).

11/ Maryland v. Marzullo, 435 U.S. 1011 (1978) (White, J., dissenting from denial of certiorari). For an example of how this issue has divided one federal court of appeals see the four opinions in United States v. DeCoster, supra (DeCoster III). See also the earlier efforts of the District of Columbia Circuit to develop a standard in Bruce v. United States, 126 U.S. App. D.C. 336, 379 F.2d 113 (1967); Diggs v. Welch, 80 U.S. App. D.C. 5, 148 F.2d 667 (1945); United States v. DeCoster, 159 U.S. App. D.C. 326, 487 F.2d 1197 (1973) (DeCoster I).

commands of the Eighth and Fourteenth Amendments to the Constitution." Lockett v. Ohio, supra at 605 (opinion of Burger, C.J., Stewart, Powell and Stevens, JJ.).

Such an unacceptable risk occurred in petitioner's case because of the failure of trial counsel to investigate petitioner's background and present a wealth of mitigating evidence which was available. Instead, counsel presented only Mr. Cape's son, a brother and two sisters in addition to Mr. Cape himself. However, counsel failed to prepare the witness to testify and limited his questioning of them to only a few perfunctory inquiries. As a result, counsel presented the evidence in such a cursory manner that it failed to give the jury any hint of the various factors in Mr. Cape's background which were compelling reasons for not imposing a sentence of death.[12/]

Petitioner presented to the court below some of the evidence which would have been presented at the sentencing hearing if petitioner had been represented by competent counsel. At the hearing before the court below, petitioner offered the

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12/ For example, Mr. Cape's brother, Ray Cape, after identifying himself and his relationship to petitioner, was asked only:

Q. Mr. Cape, have you ever known your brother to break the law in any way?

A. No sir. No, sir.

Q. Has he always supported his family and been a good provider?

A. He has. He sure has.

Q. Is he a giving person?

A. Yes, sir. Yes, sir.

Tr. at 785. Such an examination hardly painted a picture of Mr. Cape's life in the community over a period of 56 years for the jury. The examination of the other witnesses was conducted in the same cursory manner.

testimony of Ray Cape, Gladys Woody and Mabel Mosley, all of whom testified at the sentencing hearing at trial. However, unlike the sentencing hearing, where they answered a few conclusory questions, these members of Mr. Cape's family were given the opportunity to describe Mr. Cape's upbringing, his life in the community, his role in the family and his conduct of his business affairs. In the most moving terms, these family members painted a picture of Mr. Cape as a caring man, who was called upon early in life to assume responsibilities toward his family which he always met. They described how Mr. Cape was the person that other family members looked to in times of crisis or personal distress. They described his good relations with his customers and his employers. They described the times he spent with a retarded nephew, the efforts he made to see that his brother, Ray, had light work when he was disabled and the provisions he made for family members in hard times. They testified that if given the opportunity to review family photograph albums, documents and other materials, they would be able to add more detail to the picture they painted of their brother.[13/]

Petitioner also demonstrated that other members of the community, unrelated to him, were available to come forward and describe Mr. Cape to the jury and offer evidence in mitigation. For example, Harold Mauldin was one of nine character witnesses called at the guilt-innocence stage of petitioner's trial. Tr. at 587. His entire direct examination is contained on one page of transcript. He testified that Mr. Cape's reputation was good, but when asked about his reputation for violence, answered, "I never heard of any." Tr.

13/ Petitioner submitted the affidavits of two other family members who were not called at the sentencing hearing, M.I. Cape and Haskel Cape, both brothers. Both describe instances in which Mr. Cape helped them and other members of the family.

at 587. In a deposition taken in this proceeding, Mr. Mauldin describes in twelve pages of testimony, his relationship with Garnett Cape as a schoolmate, co-worker, competitor, and neighbor. He described Mr. Cape as one of the best employees he had ever had. 14/

Leroy and Louise Lovelace, who employed the petitioner to do work on their house during the three years before his arrest, testified in depositions that Mr. Cape provided them with help beyond that expected of him in his employment, that he was trusted by them, and that he did good work for them. Mr. Lovelace, who supervised many employees in the grocery business in Miami, Florida before moving to Franklin County, was asked to describe Mr. Cape as an employee. He answered as follows:

> As the top. He is the very top. Garnett Cape is a man that you don't find but a very very few in his class. In his category.
>
> . . .
>
> . . . He is nothing but the best in my book. They don't come no better than Garnett Cape.

Deposition of Leroy Lovelace at 13. Despite the fact that petitioner had worked on a part-time basis for Mr. and Mrs. Lovelace for the three years leading up to his arrest, trial counsel

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14/ Because of the restrictions on character evidence, all nine character witnesses called at petitioner's trial were asked only a few conclusory questions about petitioner's reputation in the community. Tr. at 586-603. Some of the witnesses were confused by the nature of the questions. Tr. 589-91, 600-01. Of course none of the witnesses could describe at the guilt-innocence phase their associations with the petitioner and instances such as those recalled by Mr. Mauldin in his deposition. Yet none of the witnesses were called at the sentencing phase when they would have been able to state the basis for their conclusion that the petitioner had a good reputation in the community. Mr. Mauldin's deposition demonstates how effective such testimony would have been in putting before the jury mitigating circumstances which should have been considered in determining petitioner's sentence.

never interviewed either one. As a result, this testimony of good work, unselfishness, trust and reliability was never presented to the jury that decided whether petitioner was to live or die.[15/]

In State v. Myles, 389 So.2d 12, 27-31 (La. 1980), the Supreme Court of Louisana relied heavily on the decisions of this Court in capital cases in formulating a standard for determining whether a defendant in a capital case received constitutionally sufficient assistance:

> In determining the proper standard of competency to be applied, we are ever mindful that this is a capital case. We must not only select a standard of substance, but also give close scrutiny to insure adherence to this standard. The penalty of death is qualitatively different from a sentence of imprisonment. . . . Because of that qualitative difference, there is a corresponding need for reliability in the jury's determination that death is the appropriate punishment in a specific case. Lockett v. Ohio [supra] . . . Garoner v. Florida, 430 U.S. 349, 362, 97 S.Ct. 1197, 1207, 51 L.Ed.2d 393, 405 (1977) (White, J., concurring); Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976). This necessary reliability is undermined unless it appears that the defendant received the competent assistance of an attorney acting as a diligent, conscientious advocate for his life. . . .

389 So.2d at 30 [emphasis added]. The court decided that specific standards set out in case law and in the American Bar Association Standards Relating to the Administration of Criminal Justice, The Defense Function (1974) were "desirable and necessary to give substance to the particular word formula chosen for the minimal level of competency." Id.

15/ Petitioner also submitted affidavits of other members of community, unrelated to him, who could have provided evidence in mitigation at the sentencing hearing. However, the failure of trial counsel to investigate petitioner's background and present this evidence deprived petitioner of his right to have the jury consider relevant and compelling evidence on the issue of whether he should live or die.

The court below acknowledged that petitioner had based his claim on the Eighth Amendment, but apparently declined to consider petitioner's claim that his Eighth Amendment rights were violated in much the same manner as in Lockett and Eddings by the failure of his counsel to investigate his background and present all of the mitigating evidence that was available. This Court should review this case to decide whether Eighth Amendment principles govern a determination of counsel's competence, and the constitutionally required standard for deciding claims of ineffective assistance of counsel.

II. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH DECISIONS OF THIS COURT REQUIRING THAT CONSIDERATION OF THE DEATH PENALTY BE GUIDED BY CLEAR AND OBJECTIVE STANDARDS.

Petitioner's jury was instructed at the sentencing phase of the trial in the bare words of the statutory aggravating circumstance set out in Ga. Code Ann. § 27-2534.1(b)(7):

> Now, in this case, ladies and gentlemen, the one that we are trying, the State contends that the offense of murder for which the accused, Garnett William Cape, has been convicted was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim, Karen Dove.

Tr. 812. The jury was given no definition of any of the terms of § (b)(7). The trial court also failed to give the jury any guidance regarding its consideration of mitigating circumstances in determining whether the penalty of death was appropriate. Although the words of section (b)(7) were written down and provided to the jury for study during its

deliberations, its only instruction with regard to mitigating circumstances was the statement that it was authorized to consider "those circumstances which in fairness and mercy shall be considered by you in fixing punishment," Tr. 813. The evidence presented clearly justified consideration by the jury of a number of mitigating factors, such as petitioner's age, 56, his lack of prior arrests or convictions, and his good reputation in the community. However, the jury was given no meaningful guidance as to whether it was allowed to consider these factors or how it should consider them.

The jury in returning its sentence of death made no specific findings of fact, but merely parroted the language of the statute which had been quoted to them by the trial court. Thus, as in Godfrey v. Georgia, 446 U.S. 420 (1980), the trial judge's sentencing instructions "gave the jury no guidance concerning the meaning of any of § (b)(7)'s terms. In fact, the jury's interpretation of § (b)(7) can only be the subject of sheer speculation." Id. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Therefore, petitioner is entitled to a new sentencing hearing at which the sentencer's discretion is properly directed and channeled as required by Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S. 153 (1976), and Godfrey.

> The jury must be instructed on the proper, narrow construction of the statute. The Court's cases make clear that it is the sentencer's discretion that must be channeled and guided by clear, objective, and specific standards. . . . To give the jury an instruction in the form of the bare words of the statute -- words that are hopelessly ambiguous and could be understood to apply to any murder . . . -- would effectively grant it unbridled discretion to impose the death penalty.

Godfrey, supra at 437 (Marshall, J., concurring) [citations omitted]. Under Ga. Code Ann. §26-3102, 27-2534.1(c), the sentencing authority in death cases is the jury. Once the penalty has been imposed in the exercise of unbridled discretion by the jury, it cannot be salvaged by appellate review. Here, as in Godfrey, "the standardless and unchanneled imposition of the death sentences in the uncontrolled discretion of a basically uninstructed jury . . . was in no way cured by the affirmance of those sentences by the Georgia Supreme Court." 446 U.S. at 429 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). As Mr. Justice Marshall stated:

> Such a defect could not be cured by the post hoc narrowing construction of an appellate court. The reviewing court can determine only whether a rational jury might have imposed the death penalty if it had been properly instructed; it is impossible for it to say whether a particular jury would have so exercised its discretion if it had known the law.

446 U.S. at 437 (Marshall, J., concurring).

The Georgia Supreme Court upheld petitioner's sentence of death on direct appeal from petitioner's conviction based upon its finding of serious physical abuse and serious sexual abuse. There is nothing in the record to suggest that the jury made the same findings. As petitioner stated in his habeas corpus petition, the jury could well have based the death penalty upon its belief that an aggravated battery took place since that term was not defined for it in the court's instructions. Or it could have based its decision on the testimony of Agent Patterson that this was one of the most brutal murders he had seen in 23 years as a police officer. The Georgia Supreme Court's speculation as to what the jury found based upon its review of a cold record is inconsistent

with Godfrey, Gregg and Furman. See also Presnell v. Georgia, 439 U.S. 14 (1979); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). Because of the importance of this issue in the review of death penalty cases, this Court should grant certiorari to review the decision below.

III. THE GEORGIA COURTS CONTINUE TO CONSTRUE ITS DEATH PENALTY STATUTE IN A VAGUE AND OVERBROAD MANNER IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

This court should issue a writ of certiorari to review the decision below because of the clear failure of the Georgia courts to narrow properly the application of the "catchall" aggravating circumstance contained in Ga. Code Ann. 27-2534.1 (b)(7), despite the decisions of this Court in Gregg v. Georgia, supra, and Godfrey v. Georgia, supra.[16/] This case presents an excellent example of the overbroad application of the terms of § (b)(7) by the Georgia courts. Because the Georgia courts construe § (b)(7) in such a way as to apply those terms to any assault of lethal magnitude, any and all murder cases can come within the death penalty statute. As a result, the decision of impose death rests in the unfettered discretion of Georgia prosecutors and juries in violation of the Eighth and Fourteenth Amendments.

Petitioner's sentence of death rests soley upon a finding under (b)(7) that the offense of murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind." The Georgia Supreme

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16/ In Gregg v. Georgia, 428 U.S. 153 (1976), this Court held that the statutory aggravating circumstance contained in § (b)(7) was not unconstitutional on its face, but warned that it should not be given "an open-ended construction." Id. at 201 (opinion of Stewart, Powell and Stevens, JJ.). In Godfrey v. Georgia, 446 U.S. 420 (1980), the Court reversed a decision of the Georgia Supreme Court where it had failed to apply in that case a narrow construction of § (b)(7) necessary to avoid the arbitrary and capricious infliction of the death sentence.

Court upheld petitioner's death sentence on the basis of its finding of serious physical abuse and serious sexual abuse, which, in its view, constitute "torture." The court's conclusion that the victim was physically abused is based upon the condition of the body after the decedent had been beaten with an iron pipe and stabbed. Cape v. State, supra 272 S.E.2d at 495. The finding of sexual abuse was based upon the fact that the decedent's breast was exposed and her pants were unzipped when the body was discovered and the testimony of a serologist that there was a "weak suggestion" of seminal fluid on an oral swab. Id. However, there was no evidence that the decedent was subjected to prolonged physical abuse such as would constitute torture prior to her death. Indeed, the decedent may have been rendered unconscious by the first blow she received. Tr. 332. Thus, as Mr. Justice Marshall pointed out in his concurrence in Godfrey:

> The Georgia court has given an extraordinarily broad meaning to the word "torture." Under that court's view, "torture" may be present whenever the victim suffered pain or anticipated the prospect of death. . . That interpretation would of course enable a jury to find a Section (b)(7) aggravating circumstance in most murder cases.

Godfrey v. Georgia, supra at 441 n. 12 (Marshall, J., concurring). The Georgia courts, in petitioner's case and other cases decided after Godfrey, have continued to aply such an extraordinarily broad meaning to the word "torture" in upholding death sentences under section (b)(7). See e.g., Mulligan v. State, 245 Ga. 881, 268 S.E.2d 351 (1980), cert. denied, 449 U.S. 986 (1980) (where decedent shot four times and first shot was not fatal, jury was authorized to find serious physical abuse constituting torture prior to death);

Brooks v. State, 246 Ga. 262, ___, 271 S.E.2d 172, 173 (1980); cert. denied, ___ U.S. ___, 68 L.Ed.2d 312 (1981) (where decedent shot once in neck and died within two hours, jury authorized to find torture because death not instantaneous); Baker v. State, ___ Ga. ___, 272 S.E.2d 61, 62 (1980), cert. denied, ___ U.S. ___, 67 L.Ed.2d 371 (1981) (where victim struck with a whiskey bottle and shot three times in the chest, jury authorized to find torture).[17/]

The Georgia Supreme Court's treatment of the (b)(7) issue here provides "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra at 433 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). Because the construction of (b)(7) by the Georgia courts raises an important constitutional issue which should be settled by this Court, a writ of certiorari should issue to review the decision below.

17/ Thus, the Georgia Supreme Court has failed to limit (b)(7) to cases such as McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974) and House v. State, 232 Ga. 140, 205 S.E.2d 217 (1974), as anticipated by the prevailing opinions in Gregg v. Godfrey. Gregg, supra at 201 (opinion of Stewart, Powell and Stevens, JJ.); Godfrey, supra, at 429-30 (opinion of Stewart, Blackmun, Powell and Stevens, JJ.). (In McCorquodale, the victim suffered prolonged torture in which she was beaten, burned, bitten, cut with a razor and scissors, sodomized, raped, and subjected to salt being placed in her wounds and hot wax dripped over her body before she was strangled and killed. In House, two seven year old boys were choked to death after each had been forced to submit to anal sodomy.) The Georgia court's cursory treatment of (b)(7) in petitioner's cases and other cases indicates that it has not properly limited (b)(7) to a few cases like McCorquodale and House.

CONCLUSION

For the reasons stated herein, Garnett William Cape asks that a writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

Stephen B. Bright
Suite 202
419 Seventh Street, N.W.
Washington, D.C. 20004
(202)638-4798

IN THE SUPERIOR COURT OF BUTTS COUNTY

STATE OF GEORGIA

GARNETT WILLIAM CAPE,	:	
	:	
PETITIONER	:	
	:	
VS.	:	HABEAS CORPUS
	:	FILE NO. 5020
WALTER D. ZANT	:	
WARDEN, GEORGIA	:	
DIAGNOSTIC AND	:	
CLASSIFICATION	:	
CENTER,	:	
	:	
RESPONDENT	:	

ORDER

This Habeas Corpus challenges the constitutionality of Petitioner's restraint and the imposition of the death penalty by the Superior Court of Franklin County. Petitioner was convicted of murder and sentenced to death. His conviction and sentence were affirmed by the Supreme Court. Cape v. State, 246 Ga. 520 (1978). Certiorari was denied by the Supreme Court of the United States.

The Petition, as amended, contains 63 numbered paragraphs, of which 57 allege substantive claims for relief (6-56, amendments 1-6). The Court will rule on those claims for relief by paragraphs corresponding numerically to the paragraphs in the amended petition.

The record in this case consists of the transcript

of the proceedings before this Court on May 19, 1981; the affidavits of Jeanette Shelton, Bobby Jean Phillips, M. I. Cape, and Hasket Cape;[1] the tape recorded depositions of Howard Eisenberg, Dr. Walter F. Rowe, Dr. William Enos, Marjorie S. Fargo, Harold Mauldin, H. V. Kesler, Leroy Lovelace, Louise Lovelace, August Siemon, and Harriett P. Morris; and the transcript and record of Petitioner's trial in the Franklin County Superior Court.

This was the first instance in which this Court allowed testimony to be presented by other than stenographic means - i.e., tape recorded depositions. As the case progressed, or rather failed to progress because of unforeseen difficulties, modifications in procedures became necessary. The court reporter through no fault of her own was unable to transcribe the tapes. The tapes were then returned to Counsel for Petitioner for transcription. Counsel has done so and filed the transcript along with the taped depositions. These factors account for the delay in this case.

6-18

In paragraphs 6-18, Petitioner claims he was denied effective assistance of counsel in violation of his Sixth, Eighth, and Fourteenth Amendment rights and corresponding rights under the Georgia Constitution.

FINDINGS OF FACT

Petitioner was represented at trial by Floyd W. Keeble, Jr., and Thomas M. Strickland. Mr. Keeble has

[1] Respondent's motion to exclude the affidavit of Stephen B. Bright is hereby granted. The Court will not consider the affidavit of Mr. Bright as evidence.

been practicing law since 1970. (H.T. 66). For the past three years he has served as Public Defender for the Northern Judicial Circuit. Id. He was appointed to represent Petitioner a day or two after the incident. (H.T. 67). Petitioner's family hired Mr. Strickland to assist. (H.T. 73).

Mr. Keeble was lead counsel. Id. He was responsible for most of the pretrial preparation including motions. (H.T. 73). Mr. Strickland did interview some witnesses but was mainly active during voir dire and conducted most of the sequestered voir dire. Id. Counsel also had an investigator who interviewed all witnesses of whom they were aware with the exception of a couple from the State Crime Lab. (H.T. 67).

Mr. Keeble had access to the State's file. Id. His theory of defense was to rely upon the State to prove Petitioner's guilt with the injection of Petitioner's good character. (H.T. 107).

Among the numerous motions Mr. Keeble filed (R. 8-47) was a motion for a change of venue partially because of an alleged incident at the jail in which Petitioner's life was threatened. (H.T. 68-70). The only evidence presented was the sheriff's testimony because no prisoners who knew about the incident were available to testify. Id. Counsel recalled that the prisoner who had told him of the incident had escaped and was not apprehended until after Petitioner's trial. (H.T. 85). The sheriff stated Petitioner told him of the incident, but the officer was unable to verify it. (T.T. 21 A). With regard to pretrial publicity about

the case, Counsel tried but was unable to secure affidavits or testimony on the community's reaction to the case. (H.T. 69, 77).

Counsel prevailed on his motion for individual, sequestered voir dire and for an independent psychiatric examination. (H.T. 70, 72). However, the voir dire motion was granted only as to certain matters. (H.T. 70). (See paragraphs 19-22 below). Funds for the psychiatric exam were denied by the trial judge; Petitioner's family paid for the exam. (T.T. 12 A; H.T. 72). The results of the exam were not presented at trial because Petitioner was found to be competent. (H.T. 72).

Counsel did not see the need for other experts. (H.T. 74). He did extensively discuss the scientific and autopsy reports and terminology informally with a pathologist. (H.T. 74). The pathologist did not testify, however, because Counsel had no funds for her testimony. (H.T. 90).

In the sentencing phase, Counsel presented evidence of Petitioner's good character in mitigation. In preparation for this phase, Counsel talked at length with Petitioner's son and sister about Petitioner's background. (H.T. 105-106). Counsel also consulted with other family members prior to trial. (H.T. 75). Counsel had asked Petitioner for a list of witnesses and called all of those witnesses except two or three who did not want to testify. Id.

At trial, Counsel made an opening statement

(T.T. 250-251); cross-examined State's witnesses (T.T. 320; 329; 373; 391; 408; 411; 416; 430; 435; 442; 446; 451; 457; 461; 472; 478; 481; 486; 536; 546; 550; 558; 564; 569; 577; 697; 702); made motions (T.T. 268; 291); presented 10 witnesses in the guilt/innocence phase including Petitioner (T.T. 586; 586; 588; 592; 593; 595; 597; 599; 602; 604); gave argument during the guilt/innocence phase (T.T. 739-747) following an argument by Mr. Strickland (T.T. 712-739); gave argument during the sentencing phase (T.T. 793-811) after having presented 6 witnesses (T.T. 777; 781; 781; 783; 784; 785) in addition to Petitioner in his own behalf. (T.T. 787).

CONCLUSIONS OF LAW

The Sixth Amendment right to counsel means "...not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. MacKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Pitts v. Glass, 231 Ga. 638 (1974).

Petitioner's Counsel easily meets this test. Mr. Keeble was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard.

Petitioner has claimed Counsel was ineffective in presenting the motion for a change of venue. In that this Court has concluded Petitioner has not

demonstrated a change of venue was necessary (see paragraphs 19-22), the Court cannot conclude Counsel was ineffective in not prevailing on the motion.

Petitioner has also suggested Counsel was ineffective for failing to request all bench conferences be recorded. The Court does not find Counsel ineffective for this reason because Petitioner has not demonstrated any harm from the failure to record. (See Amendment 6).

Finally, Petitioner has contended Counsel was ineffective for failing to object to the testimony of Petitioner's former daughter-in-law, Ola Cape. The Supreme Court found that the trial court did not err in denying Counsel's motion for mistrial on the basis of Ms. Cape's testimony. Cape v. State, supra at 524. Counsel's failure to object contemporaneously to the testimony does not alone make him ineffective, especially in light of the fact that a mistrial was not appropriate.

Petitioner's remaining allegations, such as Counsel should have raised certain issues in his closing arguments or should have properly prepared his witnesses, constitute the kind of hindsight which has never provided the basis for ineffective assistance claims. MacKenna v. Ellis, supra; Pitts v. Glass, supra. Disagreements about trial strategy and tactics do not require a finding of ineffectiveness. Reid v. State, 235 Ga. 378, 379 (1975); see Hawes v. State, 240 Ga. 327, 329-330 (1977).

Accordingly, this claim for relief is found to be without merit.

19-22

In paragraphs 19-22, Petitioner contends the trial court erred in denying his motion for a change of venue in violation of his constitutional rights.

FINDINGS OF FACT

Counsel filed a motion for a change of venue because of the size of the community and the nature of the incident. (H.T. 68, 82). There had allegedly been a threat against Petitioner's life at the jail, but there were no prisoners available to testify at the motions hearing who knew of the incident. (H.T. 68). Counsel recalled that the prisoner who had told him of the incident had escaped and was not recaptured until after Petitioner's trial. (H.T. 85). The sheriff testified that Petitioner had told him of the incident, but the officer was unable to verify it. (T.T. 21 A).

Counsel and his investigator tried but were unable to get affidavits or testimony about community reactions. (H.T. 69, 77). Counsel thought that the newspaper accounts, two each in the Athens and Anderson papers and one each in the two local weeklies, were not an undue amount of pretrial publicity. (H.T. 69).

During voir dire, forty-three of the forty-eight members of the array indicated they had read or heard something about the incident prior to trial. (T.T. 5-237). During the individual, sequestered portion of voir dire, one of the two questions asked was whether the juror could lay aside completely anything he or

she had heard and decide the case on the evidence presented in court. (T.T. 183-236). Only one juror indicated he could not be impartial, the reason being his close friendship with Petitioner's son, and was excused for cause. (T.T. 203-207).

CONCLUSIONS OF LAW

A defendant is entitled to a panel of impartial jurors, but this does not require that they be totally ignorant of the facts and issues involved. Mooney v. State, 243 Ga. 373, 385 (1979), citing Murphy v. Florida, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); Stevens v. State, 247 Ga. 698, 701 (1981). The test as to whether pretrial publicity has so prejudiced a case that an accused cannot receive a fair trial is whether the jurors summoned to try the case have formed fixed opinions as to guilt or innocence of the accused from reading such publicity. Welch v. State, 237 Ga. 665 (1) (1976); Dampier v. State, 245 Ga. 427, 431 (1980).

Here, though forty-three of forty-eight prospective jurors indicated they had read or heard something about the case, no juror expressed a fixed opinion on the issue of Petitioner's guilt or innocence. One juror was excused because he could not be impartial; however, his lack of impartiality was due to his friendship with Petitioner's son rather than any publicity or rumors.

Petitioner has made no showing that the jury selection process showed actual prejudice to render

his trial fundamentally unfair. Mooney v. State, supra, Dampier v. State, 245 Ga. 427, 431 (1980). Neither has Petitioner shown the trial court abused its discretion in denying the motion for lack of evidence on the alleged threat against Petitioner, Mooney v. State, supra.

Accordingly, this claim for relief is found to be without merit.

23-26

In paragraphs 23-26, Petitioner alleges his right to be tried by a fair, impartial, and representative jury was violated by the exclusion of prospective jurors having conscientious or religious scruples against the death penalty.

FINDINGS OF FACT

Only one prospective juror, Patsy Sosby, was excused for cause because of her opposition to capital punishment. (T.T. 219-222). Ms. Sosby indicated she could not consider imposing a death sentence regardless of the trial court's instructions or the evidence that would be developed. Id. Despite efforts by defense counsel to rehabilitate her, Ms. Sosby remained unequivocally opposed to capital punishment and thereafter was excused. Id.

CONCLUSIONS OF LAW

Under Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), jurors may be excused for cause because of their views on capital punishment where they would automatically vote against

the death penalty without regard to evidence which would be developed at trial. Ms. Sosby clearly meets this test and was properly excused.

Accordingly, this claim for relief is found to be without merit.

27-30

In paragraphs 27-30, Petitioner claims his right to a fair trial by an impartial jury was violated by the trial court's refusal to allow complete individual, sequestered voir dire.

FINDINGS OF FACT

Counsel filed a pretrial motion for individual voir dire and sequestration of jurors during voir dire. (R. 32-33). The trial court did not grant the motion in toto but permitted individual, sequestered voir dire on two questions: whether jurors opposed capital punishment and whether jurors could lay aside anything they had read or heard and render an impartial verdict based upon the evidence presented. (T.T. 183-226).

CONCLUSIONS OF LAW

A reading of the voir dire transcript indicates Counsel was permitted a relatively extensive examination of each prospective juror. In each instance that a juror admitted having heard or read something about the case, there is no indication that he or she had formed an opinion on the issue of Petitioner's guilt or innocence.

The request for individual, sequestered voir dire is a matter entirely within the discretion of the trial

court. Whitlock v. State, 230 Ga. 700, 706 (1973); Stinson v. State, 244 Ga. 219, 221 (1979). Petitioner has made no showing of manifest abuse of this discretion. Whitlock v. State, supra; Stinson v. State, supra.

Accordingly, this claim for relief is found to be without merit.

31-34

In paragraphs 31-34, Petitioner claims there was no valid waiver of his right to remain silent and that the introduction of his statements to police violated his constitutional rights.

FINDINGS OF FACT

The trial court conducted a Jackson-Denno hearing and determined that all statements of Petitioner to police were voluntarily made. (T.T. 427-452).

CONCLUSIONS OF LAW

The incriminating statement of which Petitioner complains was made before he invoked his right to remain silent, not afterwards as Petitioner asserts. (T.T. 429), and therefore was properly admitted.

Factual and credibility determinations concerning admissibility of a statement based on voluntariness made by a trial judge are accepted by reviewing courts unless such determinations are clearly erroneous. Johnson v. State, 233 Ga. 58 (1974); Hurt v. State, 239 Ga. 665 (1977).

Petitioner has made no showing the trial court's determination was in error.

Accordingly, the allegation in paragraphs 31-34 is found to be without merit.

35-37

In paragraphs 35-37, Petitioner contends that the admission into evidence of the results of his psychiatric examination violated his Fifth Amendment privilege against self-incrimination and Sixth Amendment right to counsel.

FINDINGS OF FACT

Petitioner underwent a psychiatric evaluation at Central State Hospital pursuant to an order of the trial court. (T.T. 7A-12A, 562). The psychiatrist who conducted the examination testified during the guilt/innocence phase of trial that he had found Petitioner was competent both at the time of the offense and to stand trial. (T.T. 563, 568).

Counsel was successful in moving for an independent psychiatric evaluation of Petitioner, which was paid for by Petitioner's family. (H.T. 71-72). The results of the independent exam were not offered at trial because Petitioner was found competent. Id.

CONCLUSIONS OF LAW

Under authority of Estelle v. Smith, ____ U.S. ____, 101 S.Ct. ____, 68 L.Ed.2d 359 (1981), Petitioner claims that the absence of Miranda warnings prior to and the absence of counsel at the court-ordered exam rendered the psychiatric testimony inadmissible.

In Estelle, the defendant had undergone a court-ordered psychiatric exam and was found competent. The Court found that the use in the sentencing phase of the psychiatrist's testimony to establish the

defendant's future dangerousness, one of three critical issues in determining whether a death sentence would be imposed, violated his privilege against self-incrimination and right to counsel.

Estelle is readily distinguished from the case at hand on the ground that the psychiatric exam in Estelle was not "a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense." 68 L.Ed.2d at 370. In fact, the Court noted that no Fifth Amendment issue would have arisen had the exam been confined to that function. Id.

Here, the psychiatrist merely testified in the guilt/innocence phase as to Petitioner's competency. This finding of competency had been corroborated in an independent exam, though the results were not offered at trial.

Petitioner has not shown that Petitioner was compelled to be a witness against himself. Neither has he shown the court-ordered exam exceeded the scope of a routine inquiry into competency to have become a critical proceeding and require the presence of counsel.

Accordingly, this claim for relief is found to be without merit.

38-39

In paragraphs 38-39, Petitioner claims the testimony of Special Agent R. C. Patterson in the sentencing phase violated his constitutional rights.

FINDINGS OF FACT

Special Agent R. C. Patterson of the Georgia Bureau of Investigation testified to his investigation of the crime scene in the sentencing phase of trial. (T.T. 777-781). When asked by the State to describe the victim's death, the agent responded, "In twenty-three years I've seen a lot of brutal deaths, some maybe as brutal as this, but none any more or more severe than this death of Karen Dove. Added to that, a lot of times if you go to a death, it's an old person; they've lived a life. Karen did not. She was still just a child." (T.T. 780).

CONCLUSIONS OF LAW

The Court acknowledges that upon proper objection the trial court would have excluded the opinion from the agent as to the quantum of brutality involved in the death of the victim. Petitioner's Counsel did not object to the testimony but should have. However, viewed in the context of all evidence in both testimonial and documentary (Photos S-4, S-6 S-7, S-8, S-9, S-10, S-11, S-41) form, the trial court committed no error because no objection was made.

This simply begs the ultimate question: was Counsel ineffective for failing to object? In light of the entire trial and all the evidence before the jury, Counsel might well have concluded that an objection would antagonize the jury more than it would have helped. Whether to object is a tactical

decision which is the exclusive province of a lawyer after consultation with his client. Reid v. State, supra; Hawes v. State, supra.

The Court finds the failure to object was likely to have been harmless in light of all the evidence before the jury.

Accordingly, this claim for relief is found to be without merit.

40-41

In paragraphs 40-41, Petitioner alleges that the prosecutor made improper comments in his closing arguments in both phases of trial which violated Petitioner's Eighth and Fourteenth Amendment rights and rights under the Georgia Constitution.

FINDINGS OF FACT

The Supreme Court has already concluded Petitioner's death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Cape v. State, supra at 527.

CONCLUSIONS OF LAW

The argument that is improper is that which introduces facts not in evidence and is calculated to prejudice the defendant, not flights of oratory, figurative speech or false logic. Wheeler v. State, 220 Ga. 535, 537 (1965); Leutner v. State, 235 Ga. 77, 84 (1975).

The Court has examined the closing arguments of the prosecutor in both the guilt/innocence and

sentencing phases. (T.T. 710-712, 747-762; 788-793). When read in their entirety, the prosecutor's arguments are not improper. Wheeler v. State, supra; Leutner v. State, surpa.

Accordingly, this claim for relief is found to be without merit.

42-46

In paragraphs 42-46, Petitioner alleges the death penalty is unconstitutionally administered and applied.

Georgia's death penalty statute has been held constitutional. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, reh den 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976).

The Court has examined but is not persuaded by the evidence offered by Petitioner.

Accordingly, this allegation is found to be without merit.

47-48

In paragraphs 47-48, Petitioner claims his death is being exacted pursuant to a pattern and practice of Georgia authorities to discriminate on grounds of race, sex, and poverty.

The Court is not persuaded by the evidence offered by Petitioner.

Accordingly, this allegation is found to be without merit.

49-53

In paragraphs 49-53, Petitioner attacks the constitutionality of Georgia's statutory provisions

and practices governing appellate review of death sentences.

Georgia's death penalty statute has been declared constitutional. Gregg v. Georgia, supra.

The Supreme Court of Georgia has conducted its sentence review and concluded Petitioner's death sentence was not excessive or disproportionate. Cape v. State, supra, at 529.

Accordingly, this allegation is found to be without merit.

54-56

In paragraphs 54-56, Petitioner attacks the constitutionality of the use of electrocution as the means by which to administer his death sentence.

The Court finds this allegation to be without merit.

Amendment 1

See paragraphs 6-18.

Amendment 2

The Supreme Court has already concluded that a limiting charge on Ga. Code Ann. §27-2534.1(b)(7) was not required under the facts of the case. Cape v. State, supra at 527.

This Court is unaware of any requirement of specific fact-finding by a jury for (b)(7) other than to find its existence beyond a reasonable doubt.

The Supreme Court has already expressly upheld the charge on mitigating circumstances. Cape v. State, supra at 526.

Accordingly, the allegations in amendment 2 are found to be without merit.

Amendment 3

The Supreme Court has already concluded that the (b)(7) aggravating circumstance was properly applied in this case. Cape v. State, supra at 527.

Amendment 4

The Supreme Court has already concluded that the evidence supports the finding of the (b)(7) aggravating circumstance beyond a reasonable doubt. Cape v. State, supra at 529.

Amendment 5

The Supreme Court has already concluded that the trial court did not abuse its discretion in denying the motion for mistrial on the basis of Ola Cape's testimony. Cape v. State, supra at 524.

The testimony of the forensic seriologist as to the presence of seminal fluid being "weakly suggested" was one result in the series of scientific tests conducted on physical evidence from the scene of the crime. As such, the testimony was relevant and properly admitted.

Accordingly, this claim for relief is found to be without merit.

Amendment 6

In amendment 6, Petitioner claims that the failure to record bench conferences deprived him of his Sixth Amendment right to counsel and Fourteenth Amendment right to due process and equal protection of law.

FINDINGS OF FACT

Though Counsel did not request complete recordation, he stated only one bench conference could possibly have had any effect on future appeals. (H.T. 71). Counsel requested that a black plastic bag be removed from the courtroom because of its odor. Id. He objected to its admission into evidence on grounds of prejudice and relevancy, but the issue was decided adversely to Petitioner on direct appeal. Cape v. State, supra at 524.-

CONCLUSIONS OF LAW

Failure to transcribe bench conferences is not harmful per se; the defendant as appellant must demonstrate harm resulting from the failure to transcribe. Davis v. State, 242 Ga. 901, 903 (1979); Rutledge v. State, 245 Ga. 768, 773 (1980).

Petitioner has not demonstrated any harm or prejudice arising from the failure to transcribe bench conferences.

Accordingly, this allegation is found to be without merit.

WHEREFORE, all allegations in the Petition having been found to be without merit, the Petition is denied.

This 28 day of October, 1981.

ALEX CRUMBLEY
JUDGE SUPERIOR COURTS
FLINT JUDICIAL CIRCUIT

Application No. 1877

SUPREME COURT OF GEORGIA

ATLANTA, February 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GARNETT WILLIAM CAPE V. WALTER D. ZANT, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Joline B. Williams Clerk.

Applic. No. 1877

SUPREME COURT OF GEORGIA

ATLANTA, March 24, 1982

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

GARNETT WILLIAM CAPE V. WALTER D. ZANT, WARDEN

Upon consideration of the Motion for Reconsideration filed in this Application, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Hallford, Deputy Clerk.

[21a]

No. 81-6777

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

RECEIVED
JUN 24 1982
OFFICE OF THE CLERK
SUPREME COURT, U.S.

GARNETT WILLIAM CAPE,

Petitioner,

v.

WALTER D. ZANT, WARDEN,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

BRIEF IN OPPOSITION FOR THE RESPONDENT

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

MARION O. GORDON
Senior Assistant
Attorney General

JOHN C. WALDEN
Senior Assistant
Attorney General

132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

QUESTIONS PRESENTED

1.

Whether the state habeas corpus court properly determined that Petitioner received effective assistance of counsel.

2.

Whether the instruction given to the jury in the sentencing phase provided complete and proper guidance for the consideration of the death penalty in the instant case.

3.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in the instant case did not result in an overbroad construction of the seventh statutory aggravating circumstance.

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Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

PART ONE

STATEMENT OF THE CASE

Petitioner, Garnett William Cape, was indicted in Franklin County, Georgia during the October Term, 1979 for the murder of Karen Dove. (R. 4, 5). Following a trial by jury, Petitioner was found guilty of murder and the jury imposed the death penalty based on a finding of the seventh statutory aggravating circumstance. Ga. Code Ann. § 27-2534.1(b)(7).

The evidence at trial revealed that the Petitioner, a fifty-six year old male, was the uncle of the victim's mother. He was also well-acquainted with the victim's family and had developed a close relationship with all members of the family, including the victim, a fifteen year old high school student.

The parents of the victim had previously requested the Petitioner not to come around their daughter any longer. The victim's mother testified that the Petitioner had seemed too interested in the victim and was acting more like a boyfriend toward her. Approximately two weeks prior to the murder, Petitioner was talking to the victim's brother about buying a car for her.

On May 12, 1979, Petitioner went to a car dealership and indicated that he wanted to buy a car for his niece. He signed an order for a car costing over $8,000. The next day the Petitioner took the victim to the dealership to see the car. On Monday he informed the dealership that his money was being wired from a bank in Texas and that he would pick up the car on Thursday.

On May 17, 1979, Petitioner took the victim and a friend to school. Petitioner picked up the victim from school at 3:15 p.m. that afternoon. At 4:45 p.m. Petitioner went to a hardware store and told the victim's brother that he had taken Karen to get her birth certificate at the courthouse, but that she had never come out of the courthouse. Ronald Dove, the victim's brother, noticed that the Petitioner had scratches on his hands and face at that time.

Around 6:30 p.m., the victim's brother and two friends went to the Petitioner's house. There was a note on the door indicating that the Petitioner had gone to Anderson, Georgia.. The three people unlocked the front door through a broken window pane after finding that a chair had been propped up against the front door from the inside. There were clothes scattered around the first bedroom in the house and a string of clothes was hanging across another door in the second bedroom. They found the body of Karen

Dove lying on a piece of black plastic on the floor in the second bedroom with the plastic covering half of the body of the victim.

An autoposy revealed that there were multiple stab wounds to the head of the victim, including numerous lacerations on the scalp, a wound in front of the left ear, contusions over both eyes, ears and sides of the head, multiple fractures to the skull and bruising on the tongue and lips. There were also five major stab wounds in the left side of the back and two stab wounds in the front chest. There was also an abrasion on the elbow and a contusion on the left shoulder. The cause of death was most directly related to the lost of blood. An iron pipe found in the house fit some of the wounds and could have caused the blows to the head. The evidence showed that the injuries to the face and head occurred prior to the stab wounds and that the victim was probably alive at the time the wounds were inflicted.

Tests conducted by the State Crime Lab indicated that there was a weak suggestion of the presence of seminal fluid on the oral swabs taken from the victim. Hair was found on the end of the iron pipe which was similar to that of the victim.

The Petitioner testified at trial and asserted again that the victim disappeared from the courthouse. Various witnesses testified concerning the Petitioner's character during the guilt-innocence phase of the trial and the punishment phase.

After the conviction and sentence were imposed, the Petitioner filed a motion for a new trial which was denied. A direct appeal was filed pursuant to Georgia law in the Supreme Court of Georgia. The Supreme Court of Georgia affirmed the

conviction and sentence on October 8, 1980. Cape v. State, 246 Ga. 520, 272 S.E.2d 487 (1980). This Court denied the petition for a writ of certiorari on January 26, 1981.

Petitioner subsequently filed a petition for a writ of habeas corpus in the Superior Court of Butts County, Georgia. The Court allowed tape recorded depositions to be taken in order to present evidence on that petition. Some ten depositions were taken and presented to the Court as well as approximately eight affidavits. A hearing was held on the petition on May 19, 1981, at which time Petitioner presented the testimony of three witnesses in his behalf. The testimony of Petitioner's trial attorney, Mr. Floyd W. Keeble was presented by the Respondent. On October 28, 1981, the Superior Court of Butts County denied habeas corpus relief. A subsequent application for a certificate of probable cause to appeal was denied on February 24, 1982 by the Supreme Court of Georgia.

Petitioner is now seeking to have this Court review the decision by the state habeas corpus court in this regard.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

A. THE STATE HABEAS CORPUS COURT PROPERLY DETERMINED THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL.

Petitioner has made two allegations concerning competency of counsel before this Court. Petitioner initially asserts that this Court should review this decision to ascertain what standard should be applied in determining the effectiveness of trial counsel in death penalty cases. Petitioner then seeks to have this Court review the effectiveness of his trial counsel.

Although several slightly differing standards have been set forth concerning the effectiveness of trial counsel, the standard applied by the state habeas corpus court is the same standard as applied by the courts in the State of Georgia and by the federal courts of this circuit. See Mackenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961); Pitts v. Glass, 231 Ga. 638, 203 S.E.2d 515 (1974). Thus, the standard applied by the state habeas corpus court should be determined to be the correct standard in the instant case, that is, counsel reasonably likely to render and rendering reasonably effective assistance, but not counsel judged by hindsight.

Petitioner places primary emphasis on the alleged failure of counsel to develop and present evidence in mitigation at the sentencing phase of the trial, attempting to make a comparison to the decisions of this Court in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, ___U.S.___,

102 S.Ct. 869 (1982). The decisions in those cases rested on the fact that a jury or a sentencer was prohibited, either by law or by the court, from considering evidence in mitigation which was relevant. No such prohibition existed in the instant case. Rather, Petitioner attempts to compare the actions of counsel with the prohibitions imposed by the court or by statute in the decisions in Lockett and Eddings.

In reviewing the question of the effectiveness of trial counsel, it is necessary to examine the actions of counsel in the context of the trial as a whole. Mr. Keeble thoroughly prepared for the trial of Petitioner's case. He had an investigator working with him who interviewed all of the witnesses, except for a few witnesses from the State Crime Lab, who were not interviewed until the day of trial. Mr. Keeble had access to the State's file and filed a general motion for discovery and a motion for the appointment of expert witnesses. A motion was filed challenging the constitutionality of the death penalty and a motion was filed for a change of venue. Mr. Keeble and his investigator sought affidavits to support his motion for a change of venue, but determined that there was not that much discussion in the community about the crime. Mr. Keeble also filed a motion for individually sequestered voir dire and a motion for an independent psychiatric examination of the Petitioner.

Mr. Keeble indicated that Mr. Strickland assisted in the trial of the case, interviewed witnesses and participated in the voir dire. Mr. Keeble had a friend who was a pathologist who assisted him in reviewing the terminology from the scientific report and the autoposy report. A specific request to charge on good character was submitted. Several family members were presented at trial to testify as to Petitioner's good character.

In considering the allegation of effectiveness of counsel, the state habeas corpus court found as follows:

> "In the sentencing phase, Counsel presented evidence of Petitioner's good character in mitigation. In preparation for this phase, Counsel talked at length with Petitioner's son and sister about Petitioner's background. (H.T. 105-106). Counsel also consulted with other family members prior to trial. (H.T. 75). Counsel had asked Petitioner for a list of witnesses and called all of those witnesses except two or three who did not want to testify."

(Habeas corpus order at 4). The court then went on to apply the standard previously set forth and found, "Mr. Keeble was experienced in the trial of criminal cases. He prepared for and advocated Petitioner's cause in a reasonably effective manner. The effort he put forth was certainly reasonably effective within the meaning of the standard." (Habeas corpus order at 5). Finally, as noted by the court, the allegations concerning the preparation of witnesses, "constitute the kind of hindsight which has never provided the basis for ineffective assistance claims. . . . Disagreements about trial strategy and tactics do not require a finding of ineffectiveness." (Habeas corpus order at 6).

Respondent asserts that in considering the performance of Mr. Keeble as a whole, it is clear that Mr. Keeble rendered

more than reasonably effective assistance, and in fact acted as a diligent and conscientious advocate for the Petitioner. Although at this stage, there may be things that an attorney could find that Mr. Keeble could have done, no court has ever required a standard of hindsight in considering allegations of ineffective assistance of counsel. Even in considering the performance of counsel on death penalty cases, there is no logical reason for applying a standard in which hindsight may be used to test the performance of counsel. An individual must rely on the knowledge and decisions of his trial counsel in determining the appropriate tactics and strategy to apply at trial. The mere fact that one attorney may have called more witnesses, prepared a witness differently or made different objections, does not suffice to render trial counsel's performance ineffective.

Respondent asserts that as the state habeas corpus court properly applied the correct standards in determining this issue, there are no constitutional issues presented for review by this court on a petition for a writ of certiorari.

B. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY DURING THE SENTENCING PHASE OF THE TRIAL CONCERNING THE IMPOSITION OF THE DEATH PENALTY.

Petitioner challenges the manner in which the jury was instructed at trial concerning the use of the seventh statutory aggravating circumstance. Petitioner asserts that none of the terms specified in the statute were defined, that no findings of fact were made by the jury and that the mitigating instructions were not elaborated. Petitioner also complains that there is no evidence to show that the jury made the same findings as made by the Supreme Court of Georgia on direct appeal concerning the presence of serious sexual abuse and serious physical abuse.

On direct appeal the Supreme Court of Georgia conducted its sentence review as required under Ga. Code Ann. § 27-2537(c). In conducting this review, the Court specifically considered the instruction to the jury in the sentencing phase of the trial. The Court found that a limiting charge was not required as to the aggravating circumstance used, that is, Ga. Code Ann. § 27-2534.1 (b)(7). The Court stated, "while the trial court did not give a limiting charge on § 27-2534.1(b)(7), we hold that a limiting charge was not required under the facts of this case." Cape v. State, 246 Ga. at 527, citing Godfrey v. Georgia, 446 U.S. 420 (1980) and Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980). As previously noted by this Court in Godfrey, the validity of the death sentence rests on whether the Supreme Court of Georgia can be found to have applied a constitutional construction of the seventh statutory aggravating circumstance in light of the facts and circumstances of the murder. In Godfrey, supra, no torture, aggravated battery or depravity of mind was found by the jury.

Thus, the jury merely found the first portion of the aggravating circumstance requiring the court to indulge in much speculation as to the jury's findings. "However, in the case at bar, the jury's finding of the second clause of the statute is supported by the evidence beyond a reasonable doubt, and speculation as to the jury's interpretation of the statute by the reviewing court is not required, thereby allowing rational review of the death sentence." Cape v. State, 246 Ga. at 528.

Thus, it is clear that there was no need for a further definition of the terms set forth in this seventh aggravating circumstance. The Supreme Court of Georgia has noted on prior occasions that the words in the statute are words of common meaning and understanding and do not require a specific definition. It might be argued, if aggravated battery were the issue, that the statutory definition should be presented. In the instant case the key words in the statute are torture and depravity of mind. These words are easily understood by ordinary people and do not require specific definitions.

In regard to the Petitioner's allegation on the fact finding by the jury, the state habeas corpus court noted that it was unaware of any requirement of a specific finding of fact by the jury other than to find the existence of the statutory aggravating circumstance beyond a reasonable doubt. Petitioner has cited to no such requirement either in State law or any constitutional requirement that this be made. Clearly, the jury's finding is a factual finding of the seventh statutory aggravating circumstance. No additional findings were required under the Georgia death penalty scheme.

The charge on mitigation was considered by the Supreme Court of Georgia on direct appeal. The Court noted that the instructions

to jury adequately instructed them as to the definition of mitigating circumstances. Mitigation is generally a word of common meaning and usage and it is not required that a specific definition be given. The Court further noted that under Georgia law, there is no requirement that specific mitigating circumstances be singled out by the Court, nor is there a right to have written instructions to the jury on these mitigating circumstances. Cape v. State, 246 Ga. at 526. Thus, Respondent submits that the Georgia courts followed the law in this State in instructing the jury on the presence of mitigating circumstances. The jury was instructed to consider all facts in mitigation and was provided with sufficient instructions to be able to evaluate any mitigating evidence presented in the case.

Respondent asserts that the findings by the Supreme Court of Georgia and the state habeas corpus court are proper under the prevailing law of the State of Georgia and prevailing federal constitutional principles. Thus, this Court should decline to grant review on this issue.

C. GA. CODE ANN. § 27-2534.1(b)(7) WAS PROPERLY FOUND BY THE JURY IN THE INSTANT CASE.

Petitioner asserts that the Supreme Court of Georgia has failed to properly narrow the imposition of the seventh statutory aggravating circumstance. Petitioner specifically asserts that there was no evidence of prolonged physical abuse in this case and that the victim may even have been unconscious when certain blows were rendered. Petitioner also cities certain other cases in the Supreme Court of Georgia trying to establish the allegation that the Supreme Court has applied this aggravating circumstance toobroadly.

It should first be noted, that the consideration in this case is not the application of this aggravating circumstance in all other cases, but the application to the facts and circumstances of this particular case. The use of this aggravating circumstance in other cases could at the most indicate a general tendency on the part of the court, not establish that it was applied in too broad of a manner in the instant case. Furthermore, without a thorough consideration of the records in each case cited by the Petitioner, it would be imprudent to consider whether the court had made any type of overboard application of the seventh aggravating circumstance in those cases.

What is essential in the instant case is to consider the application of the seventh aggravating circumstance under the facts as presented to the jury. The jury found, "the murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind and/or aggravated battery to the victim." The Georgia Supreme Court made the following findings in this regard:

"Under the evidence in this case, the victim was beaten with an iron pipe. She sustained multiple skull fractures and the force of the attack was so great that the skull was fractured almost in half. The victim sustained bruises on the left shoulder and neck probably as a result of being choked. The tongue and upper lip were bruised and part of the lower lip was swollen. After the victim sustained the head injuries, she was stabbed five times in the back and twice in the chest. Death ensued from the lost of blood.

When the body was found, it was in a partial state of undress. One breast was exposed and the pants the victim was wearing were unzipped. Forensic evidence suggested the presence of seminal fluid in the oral cavity, but was not conclusive. However, the state of undress, bruising about the mouth, and the suggested presence of seminal fluid would authorize a finding of serious sexual abuse. The victim was a 15-year-old female child.

By any rational standard the murder was outrageously or wantonly vile, horrible or inhuman. In that respect

> this murder is distinguishable from ordinary murders in which the death penalty is not appropriate. (cites omitted). The victim did not die instantaneously, and while she was distantly related to the Appellant, this is not a domestic murder. Nor did the victim give Appellant any reason to assault her, and she was not subjecting the Appellant to any emotional trauma. The Appellant made an elaborate attempt to hide the crime."

Cape v. State, 246 Ga. at 528.

The Court went on to cite its prior decision of Hance v. State, 245 Ga. 856, 268 S.E.2d 339, cert. denied. 449 U.S. 1067 (1980), in which it set forth standards to be met in order to constitutionally apply the seventh aggravating circumstance. The Court specifically noted that torture as used in the statute occurred when the victim was subjected to serious physical abuse before death and that serious sexual abuse could constitute the serious physical abuse. In this case, the Court found that the evidence supported a finding of serious sexual abuse and serious physical abuse. "A defendant who tortures the victim or subjects the victim to an aggravated battery before killing the victim can be found to have a depraved mind. The age and physical characteristicsof the victim may be considered in determining depravity of mind." Cape v. State, 246 Ga. at 529.

Petitioner apparently would urge this Court to set down a requirement that torture cannot be found without some sort of lengthy physical suffering like that incurred in McCorquodale v. State, 233 Ga. 369, 211 S.E.2d 577 (1974). The term "torture" has been defined as "any severe physical or mental pain; agony; anguish; the inflicting of severe pain to force information or confession, get revenge, etc." Webster's New World Dictionary 1502 (2nd Edition 1974). Thus, contrary to Petitioner's assertion, there need be no showing of "prolonged physical abuse" in order to support a finding of torture. Torture can occur with the infliction of severe pain in a matter of seconds. Petitioner's argument would require this Court to set down a time table establishing that a certain number of hours or minutes would not constitute torture but past that guideline, torture could be found. The finding by a jury of the seventh aggravating circumstance should be supported when there is sufficient evidence to support a finding of serious physical or sexual abuse, which obviously would result in severe pain to the victim. Thus, the finding of torture is supported in the instant case.

Furthermore, as found by the Supreme Court of Georgia, there is evidence to show depravity of mind in this case. The number of wounds inflicted to the victim is an indication of depravity of mind. That fact coupled with the relationship between the Petitioner and the victim, coupled with the age of the victim and the Petitioner and the condition of the body itself, all support a finding of depravity of mind on the part of the Petitioner.

Thus, Respondent submits that in the instant case the finding of the seventh aggravating circumstance was completely supported by the evidence. This case is not a "typical" murder

case, but involves many additional factors taking it out of that category, thus justifying the imposition of the death penalty in this case.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests that this Court deny the petition for a writ of certiorari filed on behalf of the Petitioner, Garnett William Cape.

Respectfully submitted,

Mary Beth Westmoreland

MARY BETH WESTMORELAND
Assistant Attorney General
Counsel of Record for
the Respondent

MICHAEL J. BOWERS
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

Marion O. Gordon by VHJ

MARION O. GORDON
Senior Assistant
Attorney General

John C. Walden by VHJ

JOHN C. WALDEN
Senior Assistant
Attorney General

Please serve:

MARY BETH WESTMORELAND
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3339

CERTIFICATE OF SERVICE

I, Mary Beth Westmoreland, a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this brief in opposition for the Respondent upon the Petitioner by depositing a copy of same in the United States Mail with proper address and adequate postage to:

Mr. Stephen B. Bright
Suite 202
419 Seventh Street, N.W.
Washington, D.C. 20004

This 23rd day of June, 1982.

Mary Beth Westmoreland
MARY BETH WESTMORELAND